Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-29

AIRCRAFT & HELICOPTER LEASING & SALES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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No. .....

AIRCRAFT & HELICOPTER LEASING & SALES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

STATEMENT AS TO JURISDICTION.

The Petitioner, Aircraft & Helicopter Leasing & Sales, Inc., prays that a Writ of Certiorari issue to review the Order of the Court of Appeals for the Ninth Circuit rendered in these proceedings on March 17, 1975.

Opinion Below.

The Order of the said Court of Appeals (Appendix A, *infra,* pp. 1-4), *N.L.R.B. v. Aircraft & Helicopter Leasing & Sales, Inc.,* is unpublished.

Jurisdiction.

Said Court of Appeals denied a timely filed Petition for Rehearing on April 9, 1975, and a Notice of Appeal from its Ruling, and from said denial of said Petition for Rehearing, was filed on June 20, 1975. The jurisdiction of this Court is invoked pursuant to Section 1254(1), Title 28, United States Code.

Questions Presented.

The National Labor Relations Board, Respondent, brought action against Petitioner under powers granted to it pursuant to Section 160, *et seq.*, Title 29, of said Code, charging that Petitioner was guilty of unfair labor practices.

The questions arising thereby are:

1. Did Respondent have jurisdiction in the Action it initiated?

A. Was Petitioner, insofar as the involved employees were concerned, engaged in interstate commerce?

B. Were the involved employees, when contacting Petitioner through its Agent, engaged in a concerted action so as to come within the purview of Section 157, Title 29, of said Code?

Statement of Facts.

The Petitioner, Aircraft & Helicopter Leasing & Sales, Inc., is a California corporation with offices in Sun Valley, California. It is engaged in the manufacture, repair, sale and leasing of helicopters. In February, 1973, it employed, among other persons, Stephen Crowe, Dan Crowse, Claude Fournier, George Zuniga and Royal Wiley. The employees were not members of any union. On February 5, 1973, these five employees met in private to discuss their wages. They all felt that they should be earning a higher salary and that they would like to be furnished uniforms to wear and would like to have certain other benefits. The major consideration, however, was wages. Some of them had approached the management in the past as individuals and asked for a raise and were unsuccessful.

Crowe suggested that they make a group demand and that perhaps they would be more successful.

It was decided that they would approach their supervisor, Jesse James, and present their demand. Crowe testified that there was no discussion about what would be done if the demands were not met. [R. Tr. 73.]* Others, however, testified that there was some discussion that if anyone was fired that they would all "walk out" in order to back him up. At any rate, however, they discussed a walkout only among themselves. Each testified that they did not threaten walkout to their employer. [R. Tr. 27, 28, 32, 33, 73, 82, 121.]

These five employees then met with James and stated their demands. Crowe acted as spokesman, and told James they they were unhappy with the wages, that they would like uniforms and a cost of living raise. Crowe stated that he would like Eight Hundred Fifty Dollars ($850.00) per month, Crowse asked for Four Dollars ($4.00) per hour, and Fournier requested Nine Hundred Dollars ($900.00) per month. The other two employees did not make a request. [R. Tr. 11, 67.] There was no discussion as to what would be done if these demands were not met, except a statement by Fournier that, "Jesse, I don't believe you quite understand, this is an alternative." [R. Tr. 11, 27, 28, 32, 90.] There was no discussion as to what the alternative was.

James then discussed the demands with George Lam, the President of the Petitioner corporation. He told Lam that he expected three of the employees would

*R. Tr. refers to the stenographic transcript of the testimony at the Unfair Labor Practice Hearing.

walk out on Friday if the demands were not met. [R. Tr. 178.] He further testified that to him the term "walk out" meant quit. [R. Tr. 176.] Likewise, Lam testified that he thought the employees intended to quit. [R. Tr. 222, 228, 229.] The administrative law judge made a specific finding that James and Lam believed that the employees intended to sever employment.

They determined none of the men were deserving of a raise in pay other than Crowe, and Lam authorized an immediate raise for him. [R. Tr. 215.] Since they felt that three of the men would quit, for convenience James directed the accountant to prepare paychecks for them. Since they did not expect Zuniga and Wiley to quit, they did not have their checks prepared.

A few days later, the men asked James if any decision had been made about their demands. [R. Tr. 15, 16, 105, 106, 181, 182.] James replied that a decision had been made and that either he or Lam would meet singly with the employees in the office but they would not meet with them collectively. [R. Tr. 16, 42, 182.] Crowe informed the other employees and it was decided that they would abandon their demand to meet in a group and meet singly with James. [R. Tr. 42, 46-49, 76, 142, 143.] Two of the employees, Crowse and Wiley, indicated that they no longer intended to support the group anyway. [R. Tr. 76, 106, 107, 149.]

The first employee to meet with James was Crowse who informed James that, "I have had a change of

mind * * *. If I have not jeopardized my job * * * I would like to stay on with you." [R. Tr. 164, 165, 183, 194.] James replied that the company was not satisfied with Crowse's past work performance and could not keep him on the payroll. [R. Tr. 116, 117, 164, 165, 183, 188, 194, 195.] The company had placed a newspaper advertisement the previous month seeking a replacement for Crowse and used this opportunity to terminate employment. Crowse stated that he would not continue to work for the company at his regular salary in any event. [R. Tr. 117.]

After leaving the office, Crowse walked past the other employees, showed his check and indicated that the company had paid him off. [R. Tr. 17, 43, 50, 77, 109, 121.] None of the employees walked out with Crowse. Instead Fournier entered James' office for a meeting.

Fournier asked what was happening and if the employees were going to receive raises. [R. Tr. 17, 186, 195.] James said they were not, and Fournier said, "That's it. I am through. I'll get my tool box and leave." [R. Tr. 186, 195.]

When Fournier left the office, the others were aware that he was leaving the employ of the Petitioner. However, none of the employees walked out with him. Instead, Crowe met with James.

James offered him the raise previously authorized by Lam. [R. Tr. 51, 52, 78, 91, 93, 145, 146, 162, 185, 189.] Crowe left the office briefly to speak with the

other employees. [R. Tr. 91, 93.] When he returned, he informed James that he could not accept the raise because he had been the instigator of the employees' actions and felt obligated to stick with the other men, that he was "leaving", "terminating". [R. Tr. 94.]

Wiley and Zuniga also met with James on that date. Wiley told James that he wanted to stay on the job and has continued to work for the company since. James asked Zuniga if he was, "staying with me or are you going to walk out?" [R. Tr. 187.] Zuniga indicated that he had given his word of honor to the men and felt obligated to leave with them. [R. Tr. 123, 126, 187, 196.] James said he was sorry to hear this and that he didn't expect Zuniga to leave. He gave Zuniga until the following Monday morning to think over returning to work. [R. Tr. 124, 127, 187, 196.]

On the next day, Saturday, February 10, 1973, Crowse and Fournier made separate phone calls to Lam to wish him well on a trip he was about to take. In the course of the conversation, Lam indicated that he would be willing to talk to each about returning to work. [R. Tr. 219-223.]

At the time of the meeting with James, Crowe, Crowse and Fournier were given their final paychecks when they left James' office. Since it had not been anticipated that Zuniga or Wiley would leave, no checks had been prepared for them.

REASONS FOR GRANTING THE WRIT.

A cogent reason for this Court's consideration of its review on certiorari, underlying and permeating the following subsidiary reasons, is that said Court of Appeals has so far sanctioned the action of Respondent in its departure from the accepted and usual course of pertinent judicial proceedings as to call for an exercise of the Court's power of supervision as will hereinafter be disclosed.

In initiating its proceeding against Petitioner, Respondent was aware that—

> THE NATIONAL LABOR RELATIONS ACT CONTEMPLATES NO MORE THAN THE PROTECTION OF THE PUBLIC RIGHTS WHICH IT CREATES AND DEFINES.
>
> *Nat'l Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 366.

Furthermore, that—

> A PROCEEDING UNDER THIS ACT IS NOT, AND CANNOT BE MADE, A PROCEEDING TO ENFORCE A PRIVATE RIGHT; IT IS A PUBLIC PROCEDURE, LOOKING ONLY TO PUBLIC ENDS.
>
> *N.L.R.B. v. Colten*, 105 F.2d 179.

and that—

> THE NATIONAL LABOR RELATIONS BOARD ACTS IN A PUBLIC CAPACITY TO GIVE EFFECT TO THE DECLARED PUBLIC POLICY OF THE ACT (Sec. 151 *et seq.*)
>
> *N.L.R.B. v. Killoren*, 122 F.2d 609.
>
> THE JURISDICTION OF THE BOARD IS NOT TO BE EXERCISED IN ANY PARTICULAR CASE UNLESS IN THE OPINION OF THE BOARD THE UNFAIR LABOR PRAC-

TICE COMPLAINED OF INTERFERES SO SUBSTANTIALLY WITH THE PUBLIC RIGHTS CREATED BY THIS ACT (Sec. 151 *et seq.*) AS TO REQUIRE ITS RESTRAINTS IN THE PUBLIC INTEREST.

N.L.R.B. v. Newark Morning Ledger Co., 120 F.2d 262.

At no place in the Record is it shown that the labor dispute between Petitioner and its employees interfered with the public rights created by said Sections 151 *et seq.* so as to require its restraints in the public interest.

That being the case, Petitioner holds it to have been of doubtful operability that—

THE BOARD IS REQUIRED TO OBSERVE THE TRADITIONAL RULE AGAINST THE PRESUMPTION OF LIABILITY OR BAD FAITH.

Boeing Airplane Co. v. N.L.R.B., 140 F.2d 423.

because,

THE TEST OF THE BOARD'S JURISDICTION UNDER THIS ACT (Sec. 151 *et seq.*) IS NOT WHETHER THE OPERATIONS OF THE EMPLOYER CONSTITUTE INTERSTATE COMMERCE BUT WHETHER THE STOPPAGE OF ITS OPERATIONS BY THREATENED INDUSTRIAL STRIFE WOULD RESULT IN SUBSTANTIAL INTERRUPTION TO OR INTERFERENCE WITH THE FREE FLOW OF SUCH COMMERCE.

N.L.R.B. v. Baltimore Transit Co., 140 F.2d 51.

and—

BEFORE THE BOARD MAY EXERCISE JURISDICTION IT MUST APPEAR EITHER THAT THE INDUSTRY UNDER CONSIDERATION IS ENGAGED IN INTERSTATE COMMERCE OR THAT ITS INTRASTATE BUSINESS IS OF SUCH A NATURE THAT DISTURBANCE THEREOF WOULD SUBSTANTIALLY AFFECT INTERSTATE COMMERCE.

Pueblo Gas & Fuel Co. v. N.L.R.B., 118 F.2d 304.

it being apparent that—

CONGRESS DID NOT INTEND TO CONFER POWER ON THE BOARD TO REGULATE UNFAIR LABOR PRACTICES AFFECTING INTRASTATE COMMERCE.

Foster Bros. Mfg. Co., Inc. v. N.L.R.B., 85 F.2d 984.

There has been no evidence produced in this Action that Petitioner engaged in interstate commerce, either directly or indirectly, or that "its intrastate business is of such a nature that disturbance thereof would substantially affect interstate commerce" (*Pueblo Gas*), or that "the stoppage of its operations by threatened industrial strife would result in substantial interruption to or interference with the free flow of such commerce". (Baltimore Transit.)

The Administrative Law Judge, in his Findings of Fact with regard to Petitioner's business, found that—

"During the year preceding issuance of the complaint, Respondent realized revenues exceeding $50,000.00 from the shipment of goods from its Sun Valley location directly to customers outside of California."

"Respondent is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act." (RA, V-I, p. 13.)*

The foregoing is seriously questioned inasmuch as there appears to be no evidence in support thereof. The reference, thereto, in the Complaint, although undenied in the Answer, nevertheless does not comprise evidence to support a Finding of Fact; and, particularly is this so in view of the fact that George E. Lam, Petitioner's President, was called to the stand as Petitioners' witness, and was available to Respondent's Counsel for Cross-Examination, and was directly questioned by said Judge, but at no time did either of them question Mr. Lam as to the actual nature of Petitioner's business, whether any part thereof actually flowed out of the State of California, and, if any of it did, how much of it, worked upon by the three employees, was directly involved in interstate commerce.

The National Labor Relations Board, on February 28, 1974, adopted, as its Decision and Order, "the rulings, findings, and conclusions of the Administrative Law Judge" (RA, V-I, p. 38.)

FINDINGS OF THE BOARD ARE CONCLUSIVE IF SUPPORTED BY THE EVIDENCE.

N.L.R.B. v. Register Pub. Co., (9) 141 F.2d 156.

But,

THE FINDINGS OF THE BOARD MUST HAVE SUBSTANTIAL SUPPORT IN THE EVIDENCE.

N.L.R.B. v. Norfolk Shipbuilding Corp., 109 F.2d 128.

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*RA refers to the Clerk's Record on Appeal.

about which,

THE PRINCIPLES WHICH APPLY TO TESTING WHETHER THE EVIDENCE WILL SUPPORT A JURY VERDICT APPLY TO THE FINDINGS OF THE BOARD.

N.L.R.B. v. Alco Feed Mills, 133 F.2d 419.

In other words,

IN ITS CAPACITY AS TRIER, THE BOARD IS HELD TO THE SAME STANDARD OF IMPARTIALITY AND FAIRNESS THAT A JURY IS HELD TO, AND ITS FINDINGS MUST REST ON SUBSTANTIAL EVIDENCE.

Magnolia Petroleum Co. v. N.L.R.B., 112 F.2d 545.

It is manifest that neither the Judge nor the Board, in the capacity of trier, were held to the same standard of impartiality and fairness that a jury is held to or one of them would have determined that Petitioner was not engaged in interstate commerce because—

THIS REVIEW OF THE CASES MAKES IT CLEAR THAT THE MERE REDUCTION IN THE SUPPLY OF AN ARTICLE TO BE SHIPPED IN INTERSTATE COMMERCE, BY THE ILLEGAL OR TORTIOUS PREVENTION OF ITS MANUFACTURE, IS ORDINARILY AN INDIRECT AND REMOTE OBSTRUCTION TO THAT COMMERCE. IT IS ONLY WHEN THE INTENT OR NECESSARY EFFECT ON SUCH COMMERCE IN THE ARTICLE IS TO ENABLE THOSE PREVENTING THE MANUFACTURER TO MONOPOLIZE THE SUPPLY, CONTROL ITS PRICE OR DISCRIMINATE BETWEEN ITS WOULD-BE PUR-

CHASERS, THAT THE UNLAWUL INTERFERENCE WITH ITS MANUFACTURE CAN BE SAID DIRECTLY TO BURDEN INTERSTATE COMMERCE.

Industrial Assn. of S.F. v. United States, 268 U.S. 64.

Patently, relating to Petitioner's situation, the stoppage of repair and maintenance of its helicopters because the three mechanics stopped working for it merely reduced the supply thereof for lease or sale that could be used outside the State of California. There was no showing whatsoever that the equipment those mechanics worked on were destined to be shipped or used in interstate commerce, and that their not working on the equipment in any way interfered with interstate commerce, even if it were shown that the employer himself was engaged in interstate commerce.

A consideration of the foregoing shows, without question, that Petitioner, insofar as the involved employees were concerned, was not engaged in interstate commerce and, therefore, Respondent did not have jurisdiction in the Action it initiated.

* * *

It is patent, without question, that Petitioner would have had to be engaged in interstate commerce of such nature and to such extent that work stoppage, such as would be caused by the three of Petitioner's employees, the consequences thereof would not have fallen within the purview of the *Industrial Assn.* ruling just quoted, in order for their work stoppage to have brought their

action within Section 157, Title 29, of said Code, providing, in part, for the protection of concerted activities for employees mutual aid or protection, because,

IN DETERMINING THE CONSTITUTIONAL BOUNDS OF AUTHORITY CONFERRED ON THE BOARD BY THIS SUBCHAPTER (Sec. 151 et seq.), IT IS THE EFFECT UPON INTERSTATE OR FOREIGN COMMERCE AND NOT THE SOURCE OF THE INJURY WHICH IS THE CRITERION.

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197.

That ruling, as applied to Petitioner's situation, is—

. . . THE ALL-IMPORTANT FACT THAT THERE WAS NO INTERFERENCE WITH THE FREEDOM OF OUTSIDE MANUFACTURERS TO SELL AND SHIP OR OF THE LOCAL CONTRACTOR TO BUY. THE PROCESS WENT NO FURTHER THAN TO TAKE AWAY THE LATTER'S OPPORTUNITY TO USE, AND, THEREFORE, HIS INCENTIVE TO PURCHASE. THE EFFECT UPON, AND INTERFERENCE WITH, INTERSTATE TRADE, IF ANY, WERE CLEARLY INCIDENTAL, INDIRECT AND REMOTE—PRECISELY SUCH AN INTERFERENCE AS THIS COURT DEALT WITH IN *United Mine Workers v. Coronado Co.,* 259 U.S. 344, and *United Leather Workers v. Herkert,* 265 U.S. 457.

Industrial Assn. of S.F. v. United States, 268 U.S. 64.

So, in Petitioner's situation, the stoppage of work by the three employees was *not* the criterion for determining the Board's authority (Consolidated), and said stoppage of work had, if any, such an incidental, indirect, and remote, interference with any interstate commerce in which Petitioner might have been engaged (Industrial Assn.) that it would not confer any jurisdiction upon said Board.

Inasmuch as—

> THE BOARD ASSERTS A PUBLIC RIGHT VESTED IN IT AS A PUBLIC BODY, CHARGED IN THE PUBLIC INTEREST WITH THE DUTY OF PREVENTING UNFAIR LABOR PRACTICES.
>
> *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332.
>
> (IT) DOES NOT EXIST FOR THE ADJUDICATION OF PRIVATE RIGHTS.
>
> *N.L.R.B. v. Hudson Motor Car Co.*, 136 F.2d 385.

Therefore,

> THIS CHAPTER CREATES NO PRIVATE VESTED RIGHTS BUT ONLY PUBLIC RIGHTS WHICH ARE AT ALL TIMES SUBJECT TO THE CONTROL OF CONGRESS.
>
> *Superior Engraving Co. v. N.L.R.B.*, 183 F.2d 783.

it being that—

> THIS SUBCHAPTER (Sec. 151 et seq.) DOES NOT CONFER PRIVATE RIGHTS ENFORCEABLE BY JURY TRIAL.
>
> *Agwilines, Inc. v. N.L.R.B.*, 87 F.2d 146.

In other words,

> THIS SUBCHAPTER (Sec. 151 *et seq.*) DOES NOT INTERFERE WITH THE NORMAL RIGHT OF THE EMPLOYER TO SELECT ITS EMPLOYEES OR TO DISCHARGE THEM.
>
> *N.L.R.B. v. Boss Mfg. Co.*, 107 F.2d 574.

nor does—

> THIS ACT GIVES THE BOARD SUPERVISORY POWER OVER THE CONDUCT OF A BUSINESS BY ITS OWN MANAGEMENT.
>
> *Kansas City Power & Light Co. v. N.L.R.B.*, 111 F.2d 340.

In regard to Petitioner and its conduct with its employees, the Judge and the Board would like to make it appear that said employees were engaged in a "protected" concerted activity for the purpose of collective bargaining (Sec. 157), but such is not a tenable position in that it is unsupported by the evidence.

The only concerted activity engaged in by the employees was a meeting in the office of a Jesse James, Supervisor with authority to hire and fire employees, on February 5, 1973, with five employees—Crowe, Fournier, Crowse, Wiley, and Zuniga—during which Crowe, acting as spokesman, told James that they were unhappy with the wages, would like to have uniforms, and a cost-of-living raise. [R. Tr. p. 67, lines 15-18.] That was the only "concerted" activity in evidence. Immediately thereafter, Fournier said he wanted a hundred dollars; Crowe thought he was worth $850.00 a month, but did not know what the rest of the fellows wanted; Crowse thought he wanted $4.00; Wiley and Zuniga were silent. [R. Tr. p. 67, lines 20-25.] Four-

nier's version of the same meeting was substantially the same; that Crowe told James that he thought the wages were too small, that he thought they should be getting a cost-of-living wage increase. Again, this is all the Judge hung-his-hat on as being "concerted" activity. Immediately thereafter, each veered off in his individual direction, as the Record shows. [R. Tr. p. 10, lines 9-24.]

The Record further shows that Crowse referred to the same initial point of the same meeting with James, that Crowe thought that they deserved more money, the only aspect of what was deemed to be "concerted" activity; thereafter, each man went off on his own [R. Tr. p. 100, line 5, to p. 102, line 14.] Zuniga made no mention of said meeting with James [R. Tr. pp. 118-133.] Wiley referred to the same initial meeting with the expressed belief that it was either Fournier or Crowe that initiated the meeting by Fournier deciding that he should have $900.00 a month, that Crowe decided he should have $850.00, that Crowse decided that he did not have a figure at that time, nor did he, nor Zuniga; that they wanted a cost-of-living raise, and uniforms; to which, James is said to have said that he would approach Lam, Petitioner's President, about the matter, and would give them an answer. [R. Tr. p. 138, line 25, to p. 139, line 25.]

Thereafter, according to the Record [R. Tr. p. 16, 74, 106, 143, 121], when told by James that he would talk to each of them, individually, there was no "concerted" stand by the men that they would talk as a group, or through their "spokesman"; instead, each, individually, pursued his own course, as the individual Record shows, completely nullifying the Judge's Finding of Fact, Part II, and his analysis thereof, cit-

ing in support thereof, *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, a case in which all of the employees did the same act for the same reason, that is, they all left the shop—stopped work—because the shop was too cold to work in.

Obviously, there is little or no similarity between that case and the present; there, the employees acted simultaneously, stopping work within a few minutes of each other and leaving the shop here, after an initial statement as to differing desires, each employee acted independent of the other, and deciding his own course. There may have been a general simultaneity of action, on the part of said employees, but, there was *no* "concerted" activity as contemplated in said Section 157.

Crowe, although offered a raise [R. Tr. p. 93, line 15], refused to continue in Petitioner's employment. [R. Tr. p. 94, lines 2-12.]

AN EMPLOYER CANNOT BE COMPELLED TO REINSTATE OR PAY PERSONS UNWILLING TO WORK FOR HIM.

Cupples Co. v. N.L.R.B., 106 F.2d 100.

WHERE EMPLOYEES WERE LAWFULLY DISCHARGED, THEY DID NOT REMAIN EMPLOYEES, AND WERE NOT ENTITLED TO REINSTATEMENT TO THEIR FORMER POSITIONS.

N.L.R.B. v. Montgomery Ward & Co., 157 F. 2d 486.

Crowse was terminated because of his lateness on the job. [R. Tr. p. 101, lines 5-15.]

THE BOARD IS NOT ENTITLED TO MAKE ITS AUTHORITY A PRETEXT FOR INTERFERENCE WITH THE RIGHT TO DIS-

CHARGE WHEN THAT RIGHT IS EXERCISED FOR OTHER REASONS THAN INTIMIDATION AND COERCION.

Jefferson Electric Co. v. N.L.R.B., 102 F.2d 949.

Fournier was let go because he had given Petitioner an ultimatum that it was a raise or else. [R. Tr. p. 17, lines 17-23.]

NO ORDER OF THE BOARD SHALL REQUIRE THE REINSTATEMENT OF ANY INDIVIDUAL AS AN EMPLOYEE WHO HAS BEEN SUSPENDED OR DISCHARGED, OR THE PAYMENT TO HIM OF ANY BACK PAY, IF SUCH INDIVIDUAL WAS SUSPENDED OR DISCHARGED FOR CAUSE.

Section 160(c), Title 29, U.S.C.

AN EMPLOYER MAY DISCHARGE AN EMPLOYEE FOR A GOOD REASON, A POOR REASON, OR NO REASON AT ALL, SO LONG AS THE PROVISIONS OF THIS ACT (Sec. 151 et seq.) ARE NOT VIOLATED.

N.L.R.B. v. Edward G. Budd Mfg. Co., 138 F.2d 86.

it being that—

UNDER THIS ACT (Sec. 151 *et seq.*), THE RIGHT TO HIRE AND DISCHARGE REMAINS INVIOLATE, WHEN EXERCISED FOR ORDINARY ENDS, AND THE EMPLOYER MAY STILL DISCHARGE FOR GOOD CAUSE OR NOT CAUSE AT ALL.

Jefferson Electric Co. v. N.L.R.B., 102 F.2d 949.

THE QUESTION AS TO PROPER DISCIPLINE OF EMPLOYEES WAS A MATTER FOR THE DECISION OF THE MANAGEMENT IN ITS DISCRETION.

N.L.R.B. v. Montgomery Ward & Co., 157 F.2d 486.

In fine,

THE RIGHTS OF AN EMPLOYEE GUARANTEED BY THIS SECTION (157) ARE NOT UNLIMITED BUT MUST BE EXERCISED, IN CONFORMANCE WITH HIS DUTY TO HIS EMPLOYER.

N.L.R.B. v. Rockaway News Supply Co., 197 F.2d 111.

Furthermore,

THE BOARD DOES NOT HAVE AUTHORITY TO IMPOSE A PENALTY OR TO INTERFERE WITH THE NORMAL EXERCISE OF THE RIGHT OF AN EMPLOYER TO CONDUCT ITS BUSINESS.

N.L.R.B. v. Cape County Milling Co., 140 F.2d 543.

From the foregoing, assuming, *arguendo,* but not conceding said assumption, that Petitioner was engaged in interstate commerce so as to bring its activities within the purview of Section 151 *et seq.,* still, there is no evidence to support the Part II of the Judge's Findings of Fact. Instead, said involved employees, when contacting Petitioner through its Agent, were not engaged in a concerted action so as to come within the purview of Section 157, Title 29, United States Code.

Conclusion.

For these reasons, a Writ of Certiorari should issue to review the Order of the United States Court of Appeals, for the Ninth Circuit to enforce an Order of the National Labor Relations Board.

Respectfully submitted,

JOSEPH E. MORRIS,
Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Aircraft & Helicopter Leasing & Sales, Inc., Respondent. No. 74-1796.

ORDER

[March 17, 1975].

On Petition to Enforce Order of the National Labor Relations Board.

Before: BARNES, TRASK and GOODWIN, Circuit Judges.

This proceeding is brought by the National Labor Relations Board to enforce an order of the Board issued on February 28, 1974, against respondent requiring it to reinstate three employees, who the Board found were illegally discharged in violation of Section 8(a)(1) of the National Labor Relations Act for engaging in protected concerted activity. The Board's decision is reported at 209 NLRB No. 43.

Respondent advances two reasons why the order of the Board ought not to be enforced: (1) "there is no substantial evidence in the record to support the Board's findings," and (2) "the Administrative Law Judge in a hearing of this matter committed prejudicial error in [a] failing to exclude the witnesses from the hearing, in [b] admitting immaterial evidence, and in [c] limiting examination of witnesses."

As to the first issue, it is the contention of respondent that two of the employees in question quit and the other

one was fired for poor job performance, and that none of them was fired for engaging in concerted activity. There is evidence in the record which is certainly susceptible to this interpretation, but this is not the only interpretation which this evidence will support. Most of the evidence would support either the petitioner's or respondent's version of the facts depending on whether one interprets the employees' threats to "walk out" as a threat to strike (a concerted and protected activity), or a threat to quit *en masse.* (If the employees quit they could not have been improperly terminated.) (*See e.g.*, R.T. 120 ln 20-25; R.T. 196, 1n 2-4). Some of the evidence more strongly supports an inference that the employees were fired for their concerted efforts (*See* R.T. 17 1n 17, to 18 1n 8; R.T. 108 1n 14 to 109 1n 4; R.T. 115 1n 23 to 25), other evidence supports the inference that they quit (*See* R.T. 43 1n 17-22; R.T. 51 1n 11-24; R.T. 52 1n 3-5; R.T. 78 1n 10-11; R.T. 79 1n 1-3; R.T. 193 1n 2-194 1n 19; R.T. 145 1n 14-19; R.T. 146 1n 7-10). Much of the testimony is ambiguous. It is possible and perhaps likely that even the parties themselves were unsure of what they intended to do. (*See* R.T. 73 1n 10-15).

We have carefully read the entire record and while one or more of this panel might not have decided the case the way the hearing examiner did, we conclude that his determination, and that of the Board (that the employees were terminated in violation of § 8(a)(1)) is supported by substantial evidence.

Concerning respondent's remaining contentions, we conclude that any acts complained of do not amount to an abuse of discretion, or reversible error.

First, the complained of admission into evidence of the pay check stubs with the word "terminated" written

on them was no error. In light of the other testimony of this case, and in its own right, this was material and relevant evidence. Since this case was heard before a hearing examiner, and not a jury, there is little risk of prejudice—especially (a) since respondent was afforded, and fully utilized, an opportunity to explain that "terminated" could mean either voluntary or involuntary cessation of employment; and (b) permitted to explain how the word "terminated" came to be placed on the checks, and under whose authority it was done. (*See, e.g.*, R.T. 202 *et seq.*)

Second, as to the limiting of respondent's cross-examination of witness Fournier concerning his discussions with a representative of the N.L.B.R. (R.T. 36-40), we cannot say that the exclusion of this testimony (of little apparent relevance), was an abuse of discretion. Whether or not the officer of the day in charge when the employees contacted the N.L.R.B. gave the employees "good or bad advice" regarding engaging in concerted activity—which was attorney Morris's avowed purpose in seeking to continue that line of questioning R.T. 38 1n 16-25)—appears to us, as it did to Judge Boyce (R.T. 39-40), to be of but tangential relevance to what the employees actually did. Because the excluded testimony could have had some bearing on motive, it probably should have been admitted, but viewing the record as a whole, we cannot say that its exclusion was prejudicial to respondent's case.

Third, relative to respondent's objection to the non-sequestration of discriminatees Fournier and Crowse, we note that this is also a matter committed to the sound discretion of the trier of fact. *See N.L.R.B. v. Quality & Service Laundry,* 131 F.2d 182, 183 (4th

Cir. 1942), *cert. denied,* 318 U.S. 775 (1942); *N.L.R.B. v. Great Atlantic & Pacific Tea Co.*, 408 F.2d 374, 375 (5th Cir. 1969). The Board has repeatedly held that alleged discriminatees are "parties" to a proceeding and, as such, cannot be excluded from the hearing. *Sopps, Inc.*, 189 NLRB 822 (1971); *T.I.L. Sportswear Corp.*, 131 NLRB 176, 177 n.1 (1961) enf'd., 302 F.2d 186 (D.C. Cir. 1962); *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295 (1960), enf'd., 291 F.2d 751 (8th Cir. 1961); *Scott Gross Co.*, 197 NLRB 420 n.1, enf'd., 477 F.2d 64 (6th Cir. 1973). The failure to separate witnesses who give similar testimony before a hearing examiner of the NLRB may be improvident, but it is not an abuse of discretion which requires the denial of the Board's petition for enforcement. *See N.L.R.B. v. Burke Machine Tool Co.*, 133 F.2d 618, 621 (6th Cir. 1943).

Finding substantial evidence to support the decision of the NLRB, and not finding an abuse of discretion or reversible error in the matters alleged by respondent respecting their second issue, we order that the decision of the NLRB in this case be *enforced.*